No. 94-1039

FILED
APR 12 1995
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

*Petitioners,*

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

*Respondents.*

On Writ Of Certiorari To The Supreme Court Of Colorado

## BRIEF OF AMICI CURIAE STATES OF ALABAMA, CALIFORNIA, IDAHO, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, AND VIRGINIA IN SUPPORT OF PETITIONER

CHARLES J. COOPER*
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street NW
Washington, DC 20037
Telephone: (202) 663-8000

RICHARD F. DUNCAN
P.O. Box 67134
Lincoln, NE 68506
Telephone: (402) 792-2275

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

32 pp

JEFF SESSIONS
Attorney General of Alabama
Office of the Attorney General
State House
11 South Union Street
Montgomery, AL 36130

DANIEL E. LUNGREN
Attorney General of California
1515 K Street
Sacramento, CA 94244

ALAN G. LANCE
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-0010

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

CHARLES MOLONY CONDON
Attorney General of
South Carolina
Post Office Box 11549
Columbia, SC 29211

MARK BARNETT
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

JAMES S. GILMORE III
Attorney General of Virginia
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

BEST AVAILABLE COPY



TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE ..... 1

SUMMARY OF THE ARGUMENT ..... 3

ARGUMENT ..... 6

I. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE SOVEREIGNTY OF THE PEOPLE AND THEIR RIGHT TO ALLOCATE GOVERNMENTAL POWER WITHIN THE STATE AS THEY SEE FIT. ..... 6

II. AMENDMENT 2 DOES NOT IMPAIR ANY FUNDAMENTAL RIGHT WITHIN THE MEANING OF THIS COURT'S EQUAL PROTECTION DECISIONS ..... 11

III. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE RIGHT OF THE PEOPLE TO ENACT CONSTITUTIONAL PROVISIONS TO PROTECT CIVIL LIBERTIES..... 18

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

Page

CASES

Bolling v. Sharpe, 247 U.S. 497 (1954) ..... 20

City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) ..... 7

Dreyer v. Illinois, 187 U.S. 71 (1902) ..... 9

Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417 (S.D. Ohio 1994) ..... 5, 19

Evans v. Romer, 854 P.2d 1270 (Colo. 1993), cert. denied, 114 S.Ct. 419 (1993) ..... *passim*

Evans v. Romer, 882 P.2d 1335 (Colo. 1994), cert. granted, 115 S.Ct. 1092 (1995) ..... 4

Gordon v. Lance, 403 U.S. 1 (1971) ..... 15, 16

Hunter v. Erickson, 393 U.S. 385 (1969) ..... *passim*

Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) ..... 5, 8, 9, 10

James v. Valtierra, 402 U.S. 137 (1971) ..... 5, 13, 14, 15, 16, 24

Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) ..... 4, 17

Lawrence County v. Lead-Deadwood Sch. Dist., No. 40-1, 469 U.S. 256 (1985) ..... 9

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ... 3, 7

Pacific States Tel. and Tel. Co. v. Oregon, 223 U.S. 118 (1912) ..... 10

Reitman v. Mulkey, 387 U.S. 369 (1967) ..... 13



## TABLE OF AUTHORITIES – Continued

Page

Reynolds v. Sims, 377 U.S. 533 (1964), reh'g denied, 379 U.S. 870 (1964) ..... 4, 17

Sailors v. Board of Educ. of Kent County, 387 U.S. 105 (1967) ..... 9

Sweezy v. New Hampshire, 354 U.S. 234 (1957) ..... 9

United Mine Workers of Am. Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) ..... 10

Washington v. Davis, 426 U.S. 229 (1976) ..... 12

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) ..... 12, 13, 16

Williams v. Rhodes, 393 U.S. 23 (1968) ..... 4, 17

CONSTITUTIONS

U.S. Const. amend. IV ..... 18

U.S. Const. amend. V ..... 18, 20

U.S. Const. amend. VI ..... 18

U.S. Const. amend. VIII ..... 19

U.S. Const. amend. XIV, § 1 ..... 1, 3, 4, 9, 13, 28

Ariz. Const. art. 2, § 12 ..... 23

Ark. Const. amend. 68, § 1 ..... 23

Ca. Const. art. 9, § 8 ..... 23

Ca. Const. art. 12, § 6 ..... 23

Colo. Const art. 5, § 50 ..... 23

TABLE OF AUTHORITIES – Continued

Page

Colo. Const. art. 2, § 1 ..... 6

Ga. Const. art. 4, § 1 ..... 23

Minn. Const. art. 1, § 16 ..... 23

Ok. Const. art. 9, § 18 ..... 23

Wash. Const. art. 9, § 4 ..... 23

Wis. Const. art. 1, § 18 ..... 23

RULES AND STATUTES

Maryland Regulation § 09.12.23 ..... 21

Mo. Ann. Stat. § 105.711 (Vernon 1995 Supp.) ..... 23

Or. Rev. Stat. 659.165 (1993) ..... 22

Wis. Stat. Ann. § 59.07 ..... 23

OTHER AUTHORITIES

The Federalist No. 39 (J. Madison) ..... 7

Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 12 ..... 12, 13

Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988) ..... 11

No. 94-1039

In The

# Supreme Court of the United States

October Term, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

*Petitioners,*

vs.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

*Respondents.*

On Writ Of Certiorari To The Supreme Court Of Colorado

## BRIEF OF AMICI CURIAE STATES OF ALABAMA, CALIFORNIA, IDAHO, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, AND VIRGINIA IN SUPPORT OF PETITIONER

## INTERESTS OF AMICI CURIAE

Amici curiae – states of Alabama, Idaho, California, Nebraska, South Carolina, South Dakota, and Virginia – hold a common view that the ruling and rationale below pose a serious threat to state constitutional provisions

and, more generally, to legislation enacted at any level other than local government. As detailed below, the Colorado Supreme Court has announced a fundamental constitutional right of equal group participation in the political process that, if allowed to stand, necessarily disqualifies state constitutions as repositories of important public policies. Indeed, the logical force of the court's rationale even casts doubt upon the power of state legislatures to enact laws that remove issues favored by "identifiable groups" from local political processes. Further, the novel theory underlying the ruling conflicts with established principles of equal protection, thus undermining the stability necessary for states to conduct their public affairs with reasonable confidence.

Amici curiae states join in this brief to focus attention on flaws in the analysis below and to illuminate their negative consequences for state governments. The effect of the decision below is to declare off limits to state governments an undefined body of policy choices. The prohibition is undefined because the court did not explain the term "independently identifiable groups," nor did it clarify how disagreeable state action must be to such groups before their rights of political participation are violated. Nor is it clear to what degree the new principle is prospective, or whether it might cause the undoing of numerous state policies thought to be well-settled. Whatever the scope of identifiable groups, and their protected political interests, issues falling within the uncertain contours must be left to local political processes.



This novel formulation of an asserted fundamental right does substantial violence to constitutional principles: It deprives states of their constitutional power to structure their political functions and allocate government power as they see fit; it distorts established doctrines of equal protection by imposing a hybrid right labeled "fundamental," but apparently available only to certain identifiable groups; and it conflicts with the right of the people to set public policies by enacting constitutional amendments to limit government actions.

## SUMMARY OF THE ARGUMENT

This is a case in which the court below decided that the Constitution's protection of participatory democracy somehow required the results of a voter initiative to be set aside. In order to reach this remarkable result, the court was required not only to stretch beyond recognition an important line of equal protection cases decided by this Court, but also to renounce the foundational principle that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

The decision below effectively prohibits states from addressing many substantive issues at the state level. It thus creates a right to have political issues decided – finally – at the local, rather than higher levels. This result conflicts with the general power of states to structure their political functions as they see fit, subject only to exceptions based on federally protected interests.

This case does not involve suspect classifications. *See, e.g., Hunter v. Erickson*, 393 U.S. 385 (1969). Nor is it about the right to cast a vote for the candidate of one's choice. *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968). Nor is it about the dilution of one's vote through the process of assigning voters to malapportioned districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964). Respondents seek not the vote, but rather the right to enact laws which regulate the lives and property of others free of state constitutional limitations designed to protect the liberties of those whom they seek to restrict. In other words, Respondents claim (and the court below has recognized) the right, as an "independently identifiable" interest group, to have local regulatory measures insulated by the Equal Protection Clause from revision or repeal at the state level, whether by the state legislature or by the people themselves through the initiative process.

According to the court below, Amendment 2 violates equal protection because it removes one issue important to an identifiable (but non-suspect) group from the ordinary political process by deciding the issue – homosexual and bisexual rights – as a matter of state constitutional law. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) ("*Evans I*"), Pet. App. D-25-26.[1] The Colorado court held that strict scrutiny is triggered under the Equal Protection Clause

[1] *Evans I* affirmed the trial court's issuance of a preliminary injunction against enforcement of Amendment 2. Subsequently, the Colorado Supreme Court reaffirmed the constitutional principles it had articulated in *Evans I* and entered final judgment permanently enjoining enforcement of Amendment 2. *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994) ("*Evans II*") (Pet. App. B).



not because Amendment 2 employs a suspect classification, but because it "singles out and prohibits this [non-suspect] class of persons from seeking governmental action favorable to it and, thus, from participating equally in the political process." *Id.* at D-26.

Not only is the court's holding not supported by *Hunter*, or any of this Court's other precedents, it directly conflicts with the holding and reasoning of *James v. Valtierra*, 402 U.S. 137 (1971), which explicitly rejected a claim identical in all material respects to that upheld in this case. *Hunter* and its progeny are not about an Equal Protection Clause at war with popular democracy and state constitutional freedoms. Instead, this important line of cases is inextricably intertwined with the central meaning of equal protection – the protection of racial minorities against laws which place unique burdens upon their ability to enact legislation prohibiting racial discrimination. *Hunter*, 393 U.S. at 391.

The decision of the court below seriously threatens the right of all of the people to participate collectively and directly in the political process. It also threatens many civil liberties protected by state and federal law. This decision has already been followed by one federal district court to set aside a similar ballot initiative passed by voters in Cincinnati, Ohio. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994). The decision also casts a long shadow over numerous provisions of state constitutions and statutes

that remove issues favored by other "identifiable groups" from the local political process.

## ARGUMENT

### I. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE SOVEREIGNTY OF THE PEOPLE AND THEIR RIGHT TO ALLOCATE GOVERNMENTAL POWER WITHIN THE STATE AS THEY SEE FIT.

Although the court below acknowledged that the Colorado Constitution proclaims that "[a]ll political power is vested in and derived from the people," and that the people "have the sole and exclusive right of governing themselves . . . and to alter and abolish their constitution," *Evans I* (Pet. App. D-2, *quoting* Colo. Const. art. 2, §§ 1 and 2), its decision in this case is based on a new and radical principle totally at odds with the sovereignty of the people. The "infringement" of the right of political participation which requires, according to the court, that Amendment 2 be set aside is nothing more than the necessary and normal result of a political disagreement between the sovereign people of Colorado and their elected representatives – their employees – in state and local government. The people have amended their constitution to forbid their employees from making homosexuality and bisexuality protected categories under anti-discrimination laws. The court below has determined that since this issue is important to certain identifiable



interest groups, it may not be decided by the people through an initiative amending the state constitution.

This is a revolutionary repudiation of the basic principle of self-government on which our democratic institutions are based. As this Court said almost two centuries ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness." *See also*, The Federalist No. 39 (J. Madison). In furtherance of this political truth, this Court has recognized that citizen initiatives, such as Amendment 2, are an essential means of assuring popular sovereignty. For example, in *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976), this Court stated that "[t]he referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." This Court also recognized that "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *Id.* at 672. The Colorado Supreme Court's unprecedented decision is a significant threat to the right of direct self-government through citizen initiatives. It also threatens to invalidate many basic rights currently existing under state constitutions.

Nor can the Colorado Supreme Court's decision be squared with the Constitutional principle of federalism. According to the court below, "any *legislation* or state constitutional amendment which infringes" the right of political participation must be subjected to strict scrutiny. *Evans I* (Pet. App. D-21) (emphasis added). In effect, the

court held that all issues deemed important by identifiable groups must be decided by local elected representatives, not by state legislatures, direct democracy, or constitutional amendment.

This Court has recognized, however, that local governments are instrumentalities of the state, and that the state can, with limited exceptions, grant and withdraw powers to such governments at its pleasure. The general rule concerning the power of states to structure internal political functions and to allocate government power was articulated well in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 165 (1907). There this Court wrote:

> municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. The number, nature, and duration of the powers conferred upon these corporations, and the territory over which they shall be exercised rests in the *absolute discretion of the state*. . . . The state, therefore, at its pleasure may modify or withdraw such powers, may take without compensation such property, hold itself or vest it in other agencies, expand or contract the territorial area, unite the whole or another part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, *with or without the consent of the citizens or even against their protest*.

*Id.* at 178-79 (emphasis added). *Hunter v. City of Pittsburgh* remains good law. States generally have absolute power relative to local governments. As a consequence, identifiable groups have no constitutional claim to final and



binding decisionmaking at the local level of government, and local governments have no inherent constitutional standing to challenge state action.[2]

While *Hunter v. City of Pittsburgh* addressed state authority to distribute power vertically, *i.e.*, between state and local governments, states also retain authority to allocate power horizontally, *i.e.*, among the branches of government, and the people, as they see fit. A state's allocation of power among branches of government, standing alone, is not subject to federal constitutional restraint. "Whether the legislative, executive and judicial powers of a State shall be kept distinct and separate, or whether persons or collections of persons belonging to one department may, in some respects, exert powers which, strictly speaking, pertain to another department, is for the determination of the State." *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring) ("It would make the deepest of inroads upon our federal system for this court to hold that it can determine the appropriate distribution of powers and their delegation within the . . . states.") *Sailors v. Board of Educ. of Kent County*, 387 U.S. 105, 109 (1967) ("Save and unless the state, county or municipal government runs afoul of a

---

[2] Local governments may sue the state for withdrawing power from the local political process only when some intervening federal action vests power with the subdivision rather than the state. *Cf. Lawrence County v. Lead-Deadwood Sch. Dist.*, No. 40-1, 469 U.S. 256 (1985) (payments under federal statute to units of local government "for any governmental purpose" precludes states from controlling how local units spend money).

federally protected right, it has vast leeway in the management of its internal affairs.").

State discretion in structuring decisionmaking authority also includes the choice of the people to reserve certain powers to themselves. *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (claim that initiative and referendum process violated guarantee clause held nonjusticiable). Just as *Hunter v. Pittsburgh* recognized state control over vertical distributions of power, these cases expand the principle to horizontal allocations. There is no constitutional directive that states delegate any particular power or issue to any branch of government. Correspondingly, there is no right of identifiable groups to demand that any particular branch be empowered to act on a given matter. While the right to petition *is* fundamental, *United Mine Workers of Am., Dist. 12 v. Illinois Bar Ass'n.*, 389 U.S. 217, 222 (1967), it defies law and reason to claim the right requires that every government office retain the inviolate authority to grant every petition.

To be sure, state action, concerning both substantive law as well as political process and structure, is subject to constitutional limits. States may not structure their functions in a way that damages federally protected rights or interests. *Hunter v. Erickson* 393 U.S. 385 (1969). To state that proposition, however, is to place claimed constitutional rights into a federalist context. Rights do not exist in a vacuum, and cannot be recognized without consequence to other constitutional values.

In short, the Equal Protection Clause simply does not elevate local government over all competing governmental authorities, including the people themselves.



## II. AMENDMENT 2 DOES NOT IMPAIR ANY FUNDAMENTAL RIGHT WITHIN THE MEANING OF THIS COURT'S EQUAL PROTECTION DECISIONS

The trial court rejected Respondents' claim that homosexuals and bisexuals constitute a suspect or quasi-suspect class. Pet. App. C-18-19. Respondents did not appeal that holding, and the court below did not base its decision on a suspect or quasi-suspect class rationale. *Evans I* (Pet. App. D-7-8). Thus, in order to trigger strict scrutiny of Amendment 2, it was necessary for Respondents to establish that the amendment creates "inequalities bearing on fundamental rights." *See* Laurence H. Tribe, *American Constitutional Law* § 16-7, at 1454 (2d ed. 1988).

The court below stated that the "most explicit, and nuanced, articulation" of the fundamental right at issue was contained in a series of decisions, beginning with *Hunter*, in which this Court reviewed "legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters." *Evans I* (Pet. App. D-14). The cases relied upon by the court, however, do not support the court's holding.

In *Hunter*, this Court considered whether an amendment to the Akron, Ohio city charter violated the Equal Protection Clause. The amendment prohibited the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters in a regular or general election. The racially discriminatory impact of

this provision was crucial to the Court's rationale. In striking down the challenged charter amendment, this Court did not craft an amorphous new right of political participation for any and every identifiable group; rather, the Court invalidated the law because it constituted a "meaningful and unjustified official distinction[] based on race." *Hunter*, 393 U.S. at 391.[3] In other words, the central point in *Hunter* was that the charter amendment placed "special burdens on *racial minorities*" concerning their ability to enact legislation prohibiting racial discrimination in housing. *Id.* (emphasis added).

Similarly, in *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), this Court invalidated a voter initiative which stipulated that no local school board could require any student to attend a school other than the one located nearest or next nearest to the child's residence. The initiative was facially neutral regarding race, but included a large number of exceptions to the rule, which led this Court to conclude it was enacted "because of," not merely "in spite of," its adverse effects upon busing for racial integration. *Id.* at 471. The Court carefully

[3] *Hunter* was decided several years before this Court determined, in *Washington v. Davis*, 426 U.S. 229, 239 (1976), that a facially-neutral classification is not suspect absent proof of "a racially discriminatory purpose." Professor Cass Sunstein has commented that "the difficulty now of understanding the Court's opinion [in *Hunter*] stems largely from that subsequent development." Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Sup. Ct. Rev. 127, 147. Perhaps this explains the misreading of *Hunter* by the court below.



discussed the meaning of *Hunter* and explained why legislation of the kind challenged in that case "falls into an inherently suspect category":

> [W]hen the political process or the decisionmaking mechanism used to address *racially* conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.' "

*Id.* at 485-86 (quoting *James v. Valtierra*, 402 U.S. at 141, and *Hunter v. Erickson*, 393 U.S. at 391) (emphasis added).

*Hunter* and *Seattle School District* are not fundamental rights cases. They are suspect class cases which hold that "when government acts to single out a *racial* problem for special treatment, and when the special treatment operates to the peculiar disadvantage of *racial minorities*, there is reason for more than usual suspicion of the legislative judgment." Sunstein, *supra*, 1982 Sup. Ct. Rev. at 165 (emphasis added). In other words, these cases hold that a classification is race-specific "if it singles out a racial problem for special and disadvantageous treatment." *Id.* at 149. There is no reasonable way to read *Hunter* and *Seattle School District* as supporting the far-reaching fundamental right applied by the court in this case. Both cases involved this Court's efforts to implement the principle lying at the core of equal protection — the prevention of invidious discrimination on the basis of race.[4]

[4] This also explains this Court's decision in *Reitman v. Mulkey*, 387 U.S. 369 (1967). In *Reitman*, the Court invalidated an initiated measure that guaranteed private citizens absolute discretion to discriminate in the sale or rental of residential real

As Justice Erickson's thoughtful dissent in *Evans I* makes clear, the Colorado Supreme Court's reading of *Hunter* as the source of a broad right of political participation for "identifiable groups" was explicitly discussed and rejected by this Court in *James*. *See Evans I* (Pet. App. D-49-52) (Erickson, J., dissenting). *James* upheld the constitutionality of a California constitutional amendment which provided that no "low rent housing project" could be undertaken by "any state public body" until the project was approved by a majority of the voters at a community election. *James*, 402 U.S. at 139 n.2. Thus, as in the case of Colorado Amendment 2, the California amendment made it more difficult for an identifiable group (the poor) to enact part of its legislative agenda through the normal political process. Appellees in *James*, a number of low-income residents of California, argued that the California amendment constituted "unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage." 402 U.S. at 142. The Court clearly rejected this attack on California's "procedure for democratic decisionmaking." *Id.* at 143. Justice Black's majority opinion in *James* explained the Court's reasoning in terms that reject authoritatively the reasoning of the court below in this case:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always

---

property. This Court held that the law violated the Equal Protection Clause because it "was intended to authorize, and does authorize, *racial discrimination* in the housing market." *Id.* at 381 (emphasis added).



> deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

*Id.* at 142. Since the Court in *James* read *Hunter* as a case involving political burdens on racial minorities (*id.* at 140-41), and since the poor are not a suspect class under the Equal Protection Clause, the Court held that the California amendment could be invalidated "only by extending *Hunter*, and this we decline to do." *Id.* at 141.

Likewise, the attempt by the court below to read *Gordon v. Lance*, 403 U.S. 1 (1971), as support for an extremely far-reaching right of political participation is misguided. *See Evans I* (Pet. App. D-19-20). In *Gordon*, this Court upheld a West Virginia law that proscribed the state's political subdivisions from incurring bonded indebtedness or raising taxes without the prior approval of 60% of the voters in a referendum. The Court held that, unlike the facts of *Hunter*, the West Virginia law did not single out any "discrete and insular minority" for special burdens. 403 U.S. at 5. Therefore, there was no equal protection violation. *Id.* at 7.

Noting that the West Virginia laws upheld in *Gordon* "had nothing to do with racial minorities or any other traditionally suspect class, yet the Court felt compelled to discuss Hunter," the court below concluded that *Hunter* "applies to a broad spectrum of discriminatory legislation." *Evans I* (Pet. App. D-19-20). The court attempted to bolster this specious reasoning by adding the following trivial insight: "If . . . *Hunter* is a 'race' case and nothing

more, the Supreme Court could have summarily dismissed the notion that it was applicable in *Gordon*." *Id.* But, of course, this Court in *Gordon* did precisely what *Evans I* said it did not do — it discussed *Hunter* only to distinguish it as a case involving legislation that singled out racial minorities and other suspect classes for unfavorable treatment. *Gordon*, 403 U.S. at 5. Although the West Virginia laws made it more difficult for some political groups to enact their legislative agendas, these laws did not discriminate against any racial or other suspect class and, therefore, did not violate the Equal Protection Clause. *Id.* at 5-7. Thus, *Gordon* is an application – not a repudiation – of the "race only" reading of *Hunter*.

Taken one by one or together, *Hunter*, *Seattle School District*, *James*, and *Gordon* do not support a broad right for any and every identifiable group to have its political agenda, as enacted by local governments, insulated against superseding state law. Rather, these cases recognize that the central purpose of the Equal Protection Clause is to protect racial and other suspect classes against discriminatory state action. Therefore, laws that single out racial problems for special and disadvantageous treatment are subject to strict scrutiny even if the laws are facially neutral. Laws that make it more difficult for non-suspect groups to enact their political agendas, such as the laws upheld in *James* and *Gordon*, do not conflict with equal protection. Since Amendment 2 falls into the latter category, the court below erred by subjecting the amendment to strict scrutiny.

The Colorado Supreme Court also found support for the fundamental right of political participation in this Court's cases dealing with the right to an equally



weighted vote in the electoral process. The court discovered what it referred to as a "common thread" between this case and three groups of this Court's voting rights cases – the right to vote cases, the reapportionment cases, and the ballot access cases. *See, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Williams v. Rhodes*, 393 U.S. 23 (1968). In each of these cases, however, the basis for this Court's decision was the fact that the challenged laws impinged directly on the established and fundamental right to vote for the candidates of one's choice. None of these cases even remotely invokes the principle which controlled the decision below – a vague right of political participation that extends beyond the voting booth to invalidate state constitutional limitations on substantive legislative agendas. To be sure, these voting rights cases do demonstrate that this Court recognizes the importance of equality in assuring citizens an equally-weighted vote for the candidates of their choice. The court below ignored this context and improperly read these cases as supporting a seemingly unlimited right to have a political agenda, as expressed in local regulation, insulated against the countervailing interests of others, as expressed in the statewide initiative process.

In this case, there is no state-created obstacle to voting or any other aspect of the electoral process. The voting rights cases are not applicable to Amendment 2, and the court below erred by relying upon them.

## III. THE FUNDAMENTAL RIGHT OF POLITICAL PARTICIPATION CREATED BY THE COURT BELOW IS INCONSISTENT WITH THE RIGHT OF THE PEOPLE TO ENACT CONSTITUTIONAL PROVISIONS TO PROTECT CIVIL LIBERTIES

The potential scope of the right recognized by the court below is breathtaking. If the court means what it says, it has discovered a constitutional right of any "independently identifiable class of persons" to have its political agenda insulated against normal democratic processes.

The idea animating this remarkable new right appears to be the truism that constitutional law discourages political participation by groups who favor unconstitutional legislation. Thus, homosexuals and bisexuals were discouraged by Amendment 2 because it made their desire to enact regulations on the lives, businesses, and property of others – through enactment of "gay rights" legislation – more difficult to accomplish. Similarly, the Establishment Clause of the First Amendment discourages political participation of some religious groups because it prohibits the enactment of many of their political preferences, such as state financing of parochial schools. Pro-life groups, members of which often share an "independently identifiable" religious and cultural heritage, are discouraged by the unenumerated right of privacy, by state equal rights amendments, and by other provisions of state constitutions protecting reproductive rights, because these provisions prohibit their strong preferences for laws restricting access to abortion services. Organized groups of crime victims are discouraged from political participation by the Fourth, Fifth, Sixth,



and Eighth Amendments, and by their counterparts in state constitutions, because these civil liberties invalidate laws that violate the rights of defendants in criminal cases.

The list is endless. Constitutional law routinely discourages groups from seeking to legislate political agendas which the Constitution has taken out of the hands of legislators. Indeed, the central purpose of the Bill of Rights and similar protections in state constitutions is to shelter persons whose liberties are protected against political agendas designed to restrict those rights.

The right of political participation created by the court below casts a long shadow over the right of the people to protect their freedom by adopting constitutional liberties. Although the court below did not define the concept of an "independently identifiable group," it did conclude that it was broad enough to cover non-suspect classes such as homosexuals and bisexuals. *Evans I* (Pet. App. D-25-26). Moreover, while denying that it was opening the floodgates for other groups wishing to employ the right of political participation, the court supplied no limiting principle to contain this new right. *Id.* at D-23-27.

In *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), a federal district court followed *Evans I* and permanently enjoined a ballot initiative passed overwhelmingly by the voters of Cincinnati. The court attempted to limit the scope of the right of political participation by distinguishing between "independently identifiable groups" and mere "identifiable groups." 860 F. Supp. at 434 n.12. The court said that

"the difference between an 'independently identifiable group' and an 'identifiable group' is that where the factor identifying the group transcends the mere support for any given issue, the group is 'independently identifiable.' " *Id.* "On the other hand, a group whose sole identifying characteristic is the group's support for a single issue is merely an identifiable group." *Id.* Under this definition, most identifiable groups – such as the ones discussed in the examples above – are also independently identifiable groups.[5]

Indeed, any generally applicable definition of independently identifiable group that is broad enough to include homosexuals and bisexuals almost certainly will include many other groups whose policy preferences have been placed beyond the ordinary political process by the state constitutional rights of individuals.[6] Nor is

---

[5] For example, many groups which support state financing for parochial schools share a common religious tradition, dating back several thousand years, which transcends any particular issue. Similarly, many (perhaps most) pro-life groups are composed of individuals who share religious and cultural characteristics which transcend the politics of abortion.

[6] Logically, the right of political participation would extend to apply against the federal government by virtue of the equal protection component of the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Thus, identifiable groups could argue that many provisions in federal legislation restrict their political participation by removing their preferred issues from the political process. This application of the newly-minted equal protection principle would stand the Supremacy Clause on its head.



the principle limited to constitutional provisions. According to the court below, "any *legislation* or state constitutional amendment which infringes" the right of political participation must be subjected to strict scrutiny. *Evans I* (Pet. App. D-21) (emphasis added). Although it is not clear from the opinion that the court understood the significance of this very broad statement, it appears to mean that all issues affecting identifiable interest groups must be decided by elected representatives at the level of local government. Assume, for example, the Colorado legislature had enacted statewide legislation containing the same substantive policy choice as that contained in Amendment 2. Under the decision below, the legislation is unconstitutional because it has removed the issue of homosexual rights from the normal political process of local government. This principle threatens most substantive legislation.

For example, regulation of smoking obviously affects an "independently identifiable" group. *Evans I* calls into doubt tough statewide measures such as Maryland's Regulation § 09.12.23 (barring smoking in most workplaces), promulgated under that state's Occupational Safety and Health Act, Md. Code Ann., Health Gen. § 24-501, *et seq* (1990). As a result of the regulation, smokers are unable to seek more favorable treatment from local jurisdictions. Further, if smokers secured passage of a statewide measure opening the workplace to smoking, and preempting more restrictive local standards, then *nonsmokers* would have an *Evans I* claim that they had been fenced out of the process.

As the Maryland example illustrates, *Evans I* not only encourages the factionalizing of the community into

aggrieved groups, it also generates groups with mirror opposite claims, which, if the doctrine is applied consistently, will be locked in judicial stalemate. Such is the case in Oregon, where the state legislature recently enacted a measure that is the polar opposite of Amendment 2. Oregon's new law prohibits local governments from enacting measures that block protected status based on homosexuality. *See* O.R.S. 659.165 (1993). To the extent that identifiable cultural, religious, or political groups favor enacting such local measures, they have been locked out of the process, and have a claim under *Evans I*. Thus, presumably neither the proponents nor the opponents of statewide measures extending anti-discrimination protection to homosexuals would be permitted, under the Colorado Supreme Court's reasoning, to "enact legislation in their interest."

The list of state constitutional or legislative provisions that might be challenged as interfering with the political participation of identifiable groups is long. Noted below are just a sampling of state measures that would appear vulnerable.

*State civil service and personnel systems.* Most states have some form of civil service and personnel system governing conditions of state employment. It is common for such schemes to prohibit the state from contracting out work that will result in the displacement of classified employees. However, private contractors, reform groups, taxpayer advocate groups, and others may desire greater use of contracting to accomplish state objectives. Although such a policy clearly would be "in their interest," they cannot pursue it without mounting a constitutional campaign. *See, e.g.*, Ca. Const. art. 7 § 1; Co. Const.



Art. 9, § 1; N.Y. Const. art. 5, § 6. And if the campaign succeeds, a class of independently identifiable state employees could challenge the action.

*Prohibitions on public expenditures to benefit any religious school.* Such provisions are common among the states. *See, e.g.*, Ariz. Const. art. 2, § 12; Ca. Const. art. 9, § 8; Minn. Const. art. 1, § 16; Wash. Const. art. 9, § 4; Wis. Const. art. 1, § 18; and others. As a result of such provisions, supporters of private religious schools may not petition local school districts, the state legislature, or any other democratic body for financial or material aid, even if such aid would be fully consistent with the First Amendment. Their only remedy is to seek a constitutional amendment.

*State public utility schemes.* All states have some form of utility regulation. Such schemes not only regulate the rates and practices of utilities, but grant monopoly status to such utilities. In an era of deregulation, increasing competition, and technological advance, ratepayers, consumer groups, or competing providers are making proposals to open controlled markets to competition. In many cases a constitutional amendment would be necessary to authorize such reform. *See, e.g.*, Ca. Const. art. 12, § 6; Ga. Const. art. 4, § 1, P 1; Ok. Const. art. 9, § 18.

*Bars on public funding for abortions.* Several states bar public funding of abortions, either by constitutional provision, *see, e.g.*, Ark. Const. amend. 68, § 1; Colo. Const art. 5, § 50; or by statute. *See, e.g.*, Wis. Stat. Ann. § 59.07 (West 1988 & 1994 Supp.) (prohibiting local governments from funding abortions); Mo. Ann. Stat. § 105.711 (Vernon 1995 Supp.). Several identifiable groups, such as women,

the poor, or poor women, might feel it in their interest to petition for a different policy. But they cannot, unless they mount a statewide effort.

The list could continue indefinitely, but the matters already addressed demonstrate the destabilizing nature of the "right" identified in *Evans I*. The Colorado Supreme Court's decision below should be reversed.

## CONCLUSION

The court below has misinterpreted several of this Court's equal protection decisions to create an unprecedented and revolutionary fundamental right of any and every "independently identifiable" interest group to overturn statewide constitutional and/or statutory provisions that prevent them from enacting their regulatory agendas at the local level of government. This new equal protection doctrine has cast a long shadow of uncertainty not only over the traditional right of democratic self-government, but also over the concept of constitutionalism – of representative government tempered by individual liberty. Clearly, the Equal Protection Clause does not provide protection for any and every special interest group against the political discouragement that necessarily arises when a political issue favored by the group is removed from the local political process by a constitutional amendment. As Justice Black stated in *James*, "[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James*, 402 U.S. at 141. "This procedure for democratic



decisionmaking does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.' " *Id.* at 143. The only interference with political participation in this case was the attempt by Respondents to set aside the results of an election they lost. The people of Colorado chose to enact Amendment 2. Their decision may have been wise or unwise. Regardless, nothing in the Constitution requires this substantive choice by the people to be nullified by judicial decree.

For all of the foregoing reasons, *amici* urge the Court to reverse the decision below and restore to the people of Colorado the results of their democratic decisionmaking.

Respectfully submitted,

CHARLES J. COOPER*
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street NW
Washington, DC 20037
Telephone: (202) 663-8000

RICHARD F. DUNCAN
P.O. Box 67134
Lincoln, NE 68506
Telephone: (402) 792-2275

**Counsel of Record*